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PUBLIC HEARING MEMORANDUM

Public Hearing Date: Sept 26th
ZAP Action Date: December 12th
BOA Action Date: December 19th
90 Day Expiration: December 24th

DATE: September 23, 2011

TO: Alderman Marcia T. Johnson, Chairman, and
Members of the Zoning and Planning Committee

FROM: Candace Havens, Director of Planning and Development
Jennifer Molinsky, Chief Planner for Long-Range Planning
Seth Zeren, Chief Zoning Code Official

RE: Public Hearing
#94-11(2), ALD. HESS-MAHAN proposing amendments to Chapter 30, Section 30-1, clarifying that an accessory apartment is an accessory and subordinate use to the principal dwelling on a lot; to Sections 30-8 and 30-9 clarifying that no accessory unit may be held in separate ownership from the principal dwelling and to require that any special permit for an accessory apartment automatically include a condition that the two dwellings may not be held in separate ownership; and to Section 30-22, requiring that a RAAP report Certificate of Occupancy include language clarifying that the accessory apartment must be held in common ownership with the principal dwelling unit and that the owner must dwell in one of the two units.

CC: Mayor Setti D. Warren
Board of Alderman
Planning and Development Board
John Lojek, Commissioner, Inspectional Services Department
Marie Lawlor, Assistant City Solicitor

The purpose of this memorandum is to provide the Board of Aldermen, Planning and Development Board, and the public with technical information and planning analysis which may be useful in the decision making process of the Board. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Zoning and Planning Committee of the Board of Aldermen will consider in its discussion at a subsequent Working Session.

I. Introduction

On April 11, 2011, Ald. Hess-Mahan presented three petitions (#94-11, #95-11, #102-11) to the Zoning and Planning Committee. The petitions were intended to address a problem that has occurred where a property with a legally permitted accessory apartment was divided into a condominium and the principal dwelling and accessory apartment sold individually to separate parties. This conversion to condominium, and any others which may have occurred or could occur in the future, split the ownership of the primary dwelling and the accessory apartment. An examination of Planning Department memos from the adoption of accessory apartment regulations to the present, suggests that this outcome runs against the intent and language of the accessory apartment-granting provisions of the Newton Zoning Ordinance. As a consequence, the owners of this condominium are unable to sell their dwellings as they are in violation of the Zoning Ordinance. These petitions have been docketed to 1) prevent similar problems in the future by making explicit the intent to prohibit such separate ownership and 2) to require ISD inspections of all properties in the City which are converted to condominiums to assure they are code-compliant.

Petitions #94-11, #95-11, and #102-11 were previously discussed in a working session on June 13, 2011. Petitions #95-11 and #102-11 were approved by the Zoning and Planning Committee and referred to the Finance Committee. Both items were reviewed by the Finance Committee for their fiscal impacts (as they involve levying fees and fines) and are awaiting further review.

Background

Accessory apartments were first allowed in Newton in 1987 as part of a large package of amendments (Ord. S-260). At that time they were only allowed in Single-Residence zones and only by special permit. The original policy goal appears to have been to create diverse, affordable housing opportunities, to allow residents to age in place, and to support preservation of larger historic homes. Some two years later, with no accessory apartments having been created, a new amendment (T-114) was approved in 1990 which largely created the current accessory apartment regulations. The current accessory apartment regulations allow accessory apartments in the Single-Residence and Multi-Residence zones, in most cases by special permit only. An alternative administrative review process (RAAP) is available for those properties in Single-Residence zones that can meet certain requirements for lot area and building size.

Regulating Ownership

Massachusetts case law prohibits local zoning from regulating the type of ownership of land (see Attachment A). In crafting these proposed changes we have strived to make clear that Newton considers a house with an accessory apartment a different type of land use from two separately owned dwelling units and that “use” is the basis of these regulatory changes.

II. Proposed Text Amendments

1. Insert the following into the accessory apartment definition in Section §30-1, to make more clear that an accessory apartment qualifies as a use for the purposes of zoning regulations:
    a. *"Accessory apartment*: A separate dwelling unit, located in a building originally constructed as a single family or two family dwelling or in a detached building located on the same lot as the single family or two family dwelling, as an accessory and subordinate use to the residential use of the property, provided that such separate dwelling unit has been established pursuant to the provisions of section 30-8(d) or 30-9(h) of this ordinance."

2. Insert the following changes in Section §30-8, *Use Regulations in Single Residence Districts*, to (1) reinforce that accessory apartments are uses, (2) clearly prohibit separate ownership of the principal dwelling and the accessory unit, and (3) require that any special permit include a condition that the two dwelling units may not be held in separate ownership.
    a. Replace the current (d)(1) with the following:
        i. "(1) An accessory apartment is allowed ~~in~~ as a use accessory to an owner occupied single family dwelling in accordance with the procedures of section 30-22, as applicable, and subject to section 30-15, provided that:
    b. Replace the current (d)(1)a) with the following:
        i. "The accessory apartment is located within a single family dwelling and the owner of the single family dwelling occupies either the main dwelling unit or the accessory apartment. No accessory apartment shall be held in separate ownership from the principal structure/dwelling unit."
    c. Replace the current (d)(2) with the following:
        i. "(2) The board of aldermen may grant a special permit in accordance with the procedure in section 30-24 for an accessory apartment ~~in~~ as a use accessory to an owner-occupied single family dwelling or a legal nonconforming two-family dwelling or a detached structure provided that the provisions of section 30-8(d)(1) and Table 30-8 are met, except as amended below. Any special permit issued by the Board for such use shall be automatically subject to the condition that the two dwellings may not be held in separate ownership."

3. Insert the following changes in Section §30-9, *Use Regulations for Multi-Residence Districts*, to (1) reinforce that accessory apartments are uses, (2) clearly prohibit separate ownership of the principal dwelling and the accessory unit, and (3) require that any special permit include a condition that the two dwelling units may not be held in separate ownership.
    a. Replace the current (h)(1) with the following:

i. "(1) The board of aldermen may grant a special permit for an accessory apartment ~~in~~ as a use accessory to a two-family structure or in a detached structure associated with either a single family or two family structure in accordance with the procedure in section 30-24 provided that~~:~~ the following conditions are met. Any special permit issued by the Board for such use shall be automatically subject to the condition that the principal use and the accessory dwelling may not be held in separate ownership."

b. Replace the current (h)(1)a) with the following:
   i. "a) The accessory apartment is located in a single family or two family dwelling or detached structure, and the owner of the dwelling occupies either one of the main dwelling units or the accessory apartment. No accessory apartment shall be held in separate ownership from the principal structure/dwelling unit."

4. Insert the following changes in Section §30-22, *Review of Accessory Apartment Petitions (RAAP)*, to require that any Certificate of Occupancy created as a result of the RAAP process include a condition that the two dwellings may not be held in separate ownership.
   a. Replace the current (c)(3) with the following:
      i. "(3) The petitioner shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the certificate of occupancy for the accessory apartment which states that the accessory apartment may not be held in separate ownership from the principal use, that the owner must live in either the accessory apartment or the principal dwelling, and that before ownership of the property changes, the current owner must apply to the commissioner of inspectional services for a new occupancy permit. Before issuing such occupancy permit, the commissioner of inspectional services must assure that the provisions of the Newton Zoning Ordinance and the State Building Code are met."

III. Analysis

Planning Department staff crafted the above proposals after a careful consideration of the objectives of the petition, the regulatory tools available, and the experiences of other municipalities. Two aspects deserve particular attention:

The first major consideration raised by the proposed change is the question of zoning for "use" as opposed to zoning for "ownership." Massachusetts case law says that zoning can not be used to regulate the form of ownership. The proposed language clarifies that Newton views an accessory apartment as an accessory use to the principal use and, therefore, distinct from two dwellings in separate ownership (essentially more akin to a two-family use) along the lines of *Goldman v. Town of Dennis, 1978*, where it was argued that conversion of cottage colonies to condominiums constituted an expansion of the existing

use. In the proposed amendments we make clear that a division in ownership for an accessory apartment would constitute a change in use.

The Town of Yarmouth, along with a number of other Massachusetts municipalities (see Attachment B for some examples), goes one step further in their town by-laws, requiring that "no accessory apartment shall be held in separate ownership from the principal structure/dwelling unit." While this appears to be a regulation of ownership through zoning, Yarmouth's by-laws have been approved by the Massachusetts Attorney General's Office, as is required for towns. We do not know of any case that has subsequently overturned such a regulation and have included language similar to Yarmouth's in the above proposed amendment for the consideration of the Committee, although it may be subject to future challenge.

The second major consideration concerns the concept of "severability." Typically, any particular regulation is "severable" from those around it, meaning that if one particular provision is struck down by a court ruling that the remaining provisions around it remain in effect. Newton's City Ordinances include such a provision:

> **"Chapter 1, Section 5: Severability.** It is declared to be the intention of the board of aldermen that the sections, paragraphs, sentences, clauses and phrases of the Revised Ordinances are severable, and if any phrase, clause, sentence, paragraph or section of the Revised Ordinances shall be declared invalid by the valid judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of the Revised Ordinances."

However, the last subsection of each accessory apartment section states that that each section is <u>not</u> severable:

a. "30-8(d)(5) – If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-8(d) is invalid as applied for any reason, then section 30-8(d) shall be declared null and void in its entirety."
b. "30-9(h)(3) – If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-9(h) is invalid as applied for any reason, then section 30-9(h) shall be declared null and void in its entirety."
c. "30-22(d) – If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-22 is invalid as applied for any reason, then sections 30-22 and 30-8(d)(1) shall be declared null and void in their entirety."

Thus if any part of the section is invalidated, then the entire section is void. These provisions are unique in the ordinance and date to the original accessory apartment provisions in the 1987 zoning amendments. The likely purpose of this provision was to create a firewall in the event that one or more of the limits on accessory apartments were invalidated, such as the

minimum lot area, thereby preventing use of the provision without all the limitations as enacted.

The presence of these non-severability provisions presents a potential problem. The regulations against ownership used by Yarmouth and other towns, which have been incorporated in the proposed language, have uncertain legal footing. If a similar provision in Newton's accessory apartment provisions were to be challenged and shown to be invalid, then the whole accessory apartment allowance within the zoning ordinance would be made null and void. Ultimately there is a policy trade-off between making the barriers to accessory apartment condominium conversion higher and avoiding the risk that the provisions would be subject to challenge and invalidation. This question was raised at the working session on June 13, 2011. The Zoning and Planning Committee felt broadly that such a limitation was not a cause for concern and expressed support for the non-severability protection against the possibility that a protective provision of the accessory apartment language could be repealed.

IV. Recommendations

The proposed zoning changes would go a considerable distance towards preventing any future incidents where accessory apartments are converted to separate ownership. The Planning Department considers the proposed zoning changes to be a legitimate regulation of the use of land and not a regulation of the form of ownership. Though the Planning Department has some concerns about the presence of non-severability clauses in the Zoning Ordinance, these are existing provisions which have not created any problems to date. Therefore, the Planning Department recommends the adoption of the above zoning changes.

ATTACHMENTS:
Attachment A: Excerpt from Massachusetts Zoning Manual, Martin Healy, Ed., 5th Edition 2010, pp. 2-132, 3
Attachment B: Examples of Massachusetts Zoning By-Laws Which Prohibit Separate Ownership of Accessory Apartments

§ 2.6.7 Condominium Conversions

In the 1980s, numerous attempts were made to regulate the conversion to condominiums of apartment buildings and other property through the enactment of local zoning ordinances and bylaws. The following is a partial list of the Massachusetts cities and towns that took some form of legislative action with respect to condominium conversion: Acton, Amherst, Andover, Boston, Braintree, Brewster, Brookline, Cambridge, Chatham, Dennis, Everett, Fall River, Falmouth, Fitchburg, Framingham, Gloucester, Lowell, Lynn, Malden, Newburyport, Newton, Rowley, Salem, Sandwich, Somerville, Watertown, Woburn, and Yarmouth. Pursuant to G.L. c. 40, § 32, the attorney general has consistently disapproved town zoning bylaws that attempt to control condominium conversion.

In *CHR General, Inc. v. City of Newton,* 387 Mass. 351 (1982), the Supreme Judicial Court reaffirmed the principle that zoning deals with the use of property and not with its manner of ownership. *See Bannerman v. City of Fall River,* 391 Mass. 328 (1984); *see also* definition of "zoning" in Section IA of the Zoning Act. Note that *CHR General* actually involved an ordinance adopted under the Home Rule Amendment (citing zoning as an independent municipal power), but the decision is basically zoning-oriented and has been applied equally to zoning enactments directed at the regulation of condominiums adopted under the Zoning Act. The court found that there is no distinction between the use of a building composed of condominium units from one containing rental units. There-fore, the zoning power could not be used to regulate the conversion of a rental apartment building to condominiums because this amounted to a mere regulation of a mode of ownership.

The *CHR General* decision has been supported by several court decisions. In *Sullivan v. Board of Appeals of Harwich,* 15 Mass. App. Ct. 286 (1983), the court held that the owners of a seasonal rental property could convert to condominium status without having to obtain a special permit for that purpose. *Sullivan v. Bd. of Appeals of Harwich,* 15 Mass. App. Ct. 286 (1983). In *Bannerman* v. *City of Fall River,* 391 Mass. 328 (1984), the court noted that an ordinancepurporting to regulate the conversion of rental apartments to condominiums was "private or civil law governing civil relationships" and was, therefore, invalid as an exercise of the city's Home Rule power. *Bannerman v. City of Fall River,* 391 Mass. at *331.*
However, in *Goldman v. Town of Dennis, 375* Mass. *197* (1978), a local zoning bylaw prohibiting the conversion to condominium of nonconforming cottage colonies was upheld by the Supreme Judicial Court as a valid exercise of the' zoning power. The court justified its holding by stating that the zoning bylaw did not regulate the form of ownership but rather constituted a means of protecting against the *expansion of use* of an already nonconforming property. The court determined that the town could reasonably have believed that the conversion of a cottage colony to single-family use under condominium-type ownership would encourage expansion (i.e., modification) of the use of the property by extending

usage during the spring, fall and winter seasons. Thus, the court sought to justify the bylaw as a regulation of use and not of mode of ownership. *Cf. Boston Redev. Auth. v. Charles River Park "C" Co.,* 21 Mass. App. Ct. *777* (1986) (form of ownership was construed as one of the matters regulated by urban renewal plans under G.L. c. 121B). The court in *Charles River Park* held that conversion of residential buildings located within a redevelopment area from rental apartments to condominiums was a change in use as defined by the redevelopment plan and, therefore, required prior approval of the BRA under the urban renewal statute at issue in that case. *Boston Redev. Auth. v. Charles River Park "C" Co.,* 21 Mass. App. Ct. at *781*. The decision relied on *Bronstein v. Prudential Insurance Co. of America, 390* Mass. 701 (1984), where a condominium conversion was held to be a fundamental change that altered the essence of an urban redevelopment project; the *Bronstein* court held that the contemplated change was a "modification" requiring the prior approval of the BRA. *Bronstein v. Prudential Ins. Co. of Am., 390* Mass. 701 *(1984).* One may presume, however, that the requirements and application of Chapter 121B in these cases is distinguishable from the *CHR General* line of cases under the Zoning Act.

In *Stonegate, Inc. v. Town of Great Barrington,* 14 M.L.W. 1571 (1986), the plaintiff sought to convert single-owner residential apartment buildings to interval ownership/timesharing condominiums. The Land Court acknowledged that time-share ownership as such could not be regulated under the zoning power, but the court found that such a *proposed* use is more similar to a hotel or motel than a single-family residence, and as such, a special permit was required

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Examples of Massachusetts Zoning By-Laws Which Prohibit Separate Ownership of Accessory Apartments

Attachment B

Acton Accessory Apartment Zoning By-Law

3.3.2.8 "The Apartment shall not be held in, or transferred into separate ownership from the Principal Unit under a condominium form of ownership, or otherwise."

Pembroke Accessory Apartment Zoning By-Law

IV.B.1.5.c "No accessory apartment shall be separated by ownership from the principal dwelling unit."

Sandwich Protective Zoning By-Laws

4137. "No accessory unit shall be separated by ownership from the principal dwelling."

Sudbury Accessory Dwelling Unit By-Law

5563. "No Separate Conveyance. The ownership of the Accessory Dwelling Unit shall not be conveyed or otherwise transferred separately from the principal dwelling."

Wellfleet Affordable Accessory Dwelling Unit By-Law

6.21.3 H. "No affordable accessory dwelling unit shall be separated by ownership from the principal dwelling unit or principal structure. Any lot containing an affordable accessory dwelling unit shall be subject to a recorded restriction that shall restrict the lot owner's ability to convey interest in the affordable accessory dwelling unit, except leasehold estates, for the term of the restriction."

Yarmouth Accessory Apartment By-Law

407.2.8 "No accessory apartment shall be held in separate ownership from the principal structure/dwelling unit, and it shall be so stated in the 'Declaration of Covenants'"